IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 231

THE SUPERIOR OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR SUPERIOR OIL COMPANY

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Dated: January 8, 1968

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ARGUMENT

The Superior Oil Company, Petitioner in No. 231, hereby replies to the opening brief for the Federal Power Commission, Petitioner in No. 144 and Respondent in Nos. 111, 143 and 231 on writs of certiorari to the United States Court of Appeals for the District

of Columbia Circuit decision reviewing Commission Opinion Nos. 475 and 476 (Texas Railroad District Nos. 3 and 2, respectively). Petitioner, in an effort to avoid duplication of argument, hereby adopts the Reply Brief of the Joint Petitioner-Producers' where not inconsistent with the position taken by The Superior Oil Company in its initial brief and this instant reply brief.

I

The Commission has properly taken the position[1] that price is an important part in their finding that Petitioner's proposed sales in District No. 3 is required by the public convenience and necessity. The certificate price allowed in the Section 7 proceeding will be the initial rate allowed until the just and reasonable determination and review is completed. The certificate price is intended to be the lowest reasonable rate that will assure continuing supplies for interstate consumption and yet give fair protection and encourage price stability for both the consumer and producer. Not even the Commission examiner in the Texas Gulf Coast Area Rate Proceeding, AR64-2, much less the full Commission, has decided to date what is the just and reasonable rate for Petitioner's 1958 sale in District No. 3.

The Commission price line approach properly admits to being founded on the Ninth Circuit decision in *United Gas Improvement Co.* v. *Federal Power Commission*,[2] 283 F. 2d 817, 824, cert. denied *sub nom.*

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[1] P. 19 Brief.

[2] P. 22 Brief.

Superior Oil Co. v. *United Gas Improvement Co.*, 365 U.S. 879. The court in that case and this Court in *Callery*[3] approving the Ninth Circuit held the price line required by CATCO[4] to afford consumer protection must be at the level where substantial amounts of gas entered the interstate market under contemporaneous certificates no longer subject to judicial review.

The Commission has properly adopted the Ninth Circuit suspect price doctrine wherein it held that the price line should be determined by a review of comparable non-suspect prices reflecting current conditions in the industry under which substantial interstate gas flowed. "Suspect" is defined by the Ninth Circuit and adopted by the Commission to be those prices "*still* subject to Commission or court review."[5] The refinements, the Commission acknowledged,[6] of the price line technique, including the proper ingredients that comprised a non-suspect price line, were not before this Court in *Callery*. At issue here is specific application of the suspect price doctrine to the record below to determine reliable prices for use in the average weighted price and resulting price line. Superior advocates and the Commission refuses the full consideration of all comparable relevant permanent certificates, final and no longer subject to review for use in the in-line price determination.

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[3] *U.G.I.* v. *Callery Properties*, 382 U.S. 223 (1965)

[4] *Atlantic Refining Company* v. *F.P.C.*, 360 U.S. 378 (1959).

[5] Brief p. 24. The acknowledgement suggests unequivocally that when no longer subject to review the price is no longer suspect.

[6] Brief p. 23.

II

The Commission, in an extended footnote,[7] attempts to justify why some nine 20-cent sales in District No. 3, that had been permanently certificated in proceedings and no longer subject to review, are without any probative value. Petitioner submits that its initial brief presents a complete discussion of the affirmative case for their full consideration. This reply brief will respond only to statements in the Commission Brief that when corrected will require this Court's confirmation that the Commission committed legal error in Opinion No. 475 by excluding or totally discounting these 20-cent sales as well as settlement prices from the price line determination.

a. *Pre-CATCO.* The Commission brief at page 38 states that the Commission in Opinion No. 475 regarded these sales as without value because "they were certificated prior to this Court's decision in CATCO, in proceedings in which certain of the Seaboard interests had been improperly denied the right to participate." Opinion No. 475 (III R. 7289-7311) at no point states or implies that certification of the 20-cent sales prior to this Court's CATCO was a factor in totally discounting the sales. The statement in the opening brief is a post hoc rationalization to defend a legally erroneous prejudicial ruling and is improper. *Northeast Airlines* v. *C.A.B.*, 331 F. 2d 579 (1 CCA 1963). *Burlington Truck Lines, Inc.* v. *U. S.*, 371 U.S. 156 (1962). Further, courts and the Commission have consistently held that pre-CATCO sales may be used in a price line determination. *Callery*, 382 U.S. 223, *State of California* v. *F.P.C.*, 353 F. 2d 16 (9 CCA 1965), *Union*

[7] Brief p. 38, footnote 25.

Texas Petroleum, et al., Opinion 436, et al., 32 FPC 254 (1964).

b. *Trunkline a Fully Contested Proceeding.* The Commission brief at page 38 states the Commission noted "that the failure of the Seaboard interests to pursue their challenge of those certifications was due solely to a procedural technicality and in no way suggests that the 20-cent prices would have been approved on the merits in a fully contested proceeding." This statement is a distortion of the facts. Let it not be forgotten who issued these certificates. The Commission is charged with the responsibility to regulate producers under the Natural Gas Act, not the Public Service Commission of the State of New York. The Commission did perform its administrative and quasi-judicial function. A full hearing before a duly appointed examiner and oral argument before the full Commission took place. Briefs to the examiner, exceptions to the examiner's decision and applications for rehearing were filed and considered. After full discussion and deliberation by the Commission 20¢ permanent certificates were issued.

These sales by producers on the Gulf Coast to Trunkline Gas Company for resale in the Michigan, Indiana, and Illinois areas were subjected to a full, fair and contested hearing. The following parties intervened and participated fully: State of Michigan; Michigan Public Service Commission; Michigan Gas Storage Co.; Consumer Power Company; Battle Creek Gas Co.; Michigan Gas Utilities Co.; Citizens Gas Fuel Co.; Illinois Power Co.; Board of Mayor and Aldermen of Mason, Tennessee; National Coal Association; United Mine Workers of America; and Michigan Consolidated Gas Co.

The refusal of any of these parties to seek judicial review, the fully contested nature of the proceeding, and the decision on the merits by the full Commission dictates the soundness of the Commission determination and justification for use in determining the line below. The absence of one party, Public Service Commission of the State of New York, as an intervenor whose constituents are not even the receivers of the proposed gas sale should not be now allowed to fully destroy the force and effect of that *considered* Commission decision.

c. *Trunkline Sales Not Erroneous.* The Commission brief at page 38 states the Commission is not required to perpetuate "a past error merely because the error was allowed to pass uncorrected at the time of the occurrence." It is presumed the "error" referred to is the Commission order denying intervention to P.S.C. of New York. However, the Commission procedure following the District Court decision[8] holding that a state regulatory agency as a matter of right could intervene in any proceeding before the Commission has been to allow such an agency's intervention upon the filing of notice. The "error" if any, has been corrected and is not perpetuated here.

If the "error" referred to is the issuance of 20-cent certificates to Trunkline, then this is the first time the Commission has ever suggested that these were erroneously issued certificates. These sales, almost ten years later, are still taking place. No individual Section 5(a) proceeding has been instigated against any of the sellers under these certificates. A presumption of soundness has long attached. They must be

[8] *P.S.C.* v. *F.P.C.*, 295 F. 2d 140 (CADC 1961)

taken as correct. *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9 CCA 1960). *People of the State of California* v. *F.P.C.*, 353 F. 2d 16 (9 CCA 1965). These sales are in every way as proper as any other permanently certificated sale by the Commission. These sales have received no special corrective review by the Commission and are only subject, as is *every* sale in the Texas Gulf Coast, to the just and reasonable determination of AR64-2, et al. To label them erroneous prices at the Supreme Court level for the first time is unjustified. It constitutes an improper collateral attack on a valid Commission order when no direct attack on the order has ever taken place. No evidence or explanation whatsoever is on this record to support their characterization as erroneous. To require this Court at this stage to affirm a naked statement in brief without any record or opinion discussion forces unnecessary speculation of the highest order. *Burlington Truck Lines, Inc.* v. *U.S.*, 371 U.S. 156 (1962). The Commission does not point to its own failure but the failure of a single intervenor to perfect its appeal under the Natural Gas Act and the Administrative Procedure Act to avoid giving full weight to the 20-cent sales. Petitioner submits the "error" that is being perpetuated is not the existence of these 20-cent sales but the Commission refusal to have considered them fully in *Texaco Seaboard,* Opinion No. 383, 29 FPC 593 (1963) and then improperly adopting by reference that finding in *Hassie Hunt Trust,* Opinion No. 412, 30 FPC 1438 (1963) and in Opinion No. 475 below.

III

The Commission brief at page 38 of its brief alleges that Superior's argument that the Commission erred in

including certificated sales of less than 14 cents per Mcf is without merit. Superior's purpose in raising the point was to show the inconsistency of the Commission. The 14-cent sales were not considered in setting the line for District No. 3 in the *Texaco Seaboard* and *Hassie Hunt Trust* Opinions and yet were fully considered in the record below without any explanation on the record. However, the condemning answer given by the Commission to Superior's protest of their use is *"The sales in question are permanently certificated and entitled to the full weight given them."* No other reason is given. If 14-cent permanently certificated sales deserve full weight, why should not the 20-cent permanently certificated sales be given full weight? The only answer is that they should and must be given full weight also!

Statements by the Commission or any other party in this consolidated action that Superior has failed to make its proper objection to items that should have been included or excluded in the line determination in its petition for rehearing or petition for review are inaccurate.

> "A selective use of past comparative field price studies exclusively and the simultaneous disregard of all other evidence offered or available to the Examiner and the Commission is arbitrary, unfair and improper[9] . . . The Commission erred in determining . . . that two 'in-line' prices were appropriate for the period of sales contracted herein prior to and after the issuance of the Statement of General Policy 61-1 on Sept. 28, 1960. Such a method further shows the mechanical arbitrary approach used to defend and obtain the 16¢ per

[9] III R. 7440 Application for Rehearing, The Superior Oil Company.

> Mcf price found in . . . *Texaco Seaboard* . . . Reliance on the techniques and findings of other litigated cases to determine the evidence to be admitted and the proper initial price, alone should be cause for rehearing of this case . . .[10] The Commision erred in finding that 16¢ and 17¢ per Mcf were the proper prices for the periods prior to and after the issuance of the Statement of General Policy.[11] . . . The Commission asserts that all prices 17½¢ and above are considered suspect . . . Such use of the mangled suspect price approach is in error.[12]

Further, in Superior's petition for Review, Superior in Section IV stated:

> "Petitioner submits the Commission erred as follows: . . . (h) In applying faulty techniques to determine that the 'in-line' prices should be 16.0¢ and 17.0¢ per Mcf for the respective periods prior to and after September 28, 1960. . . . (r) In finding the proper initial price required by the present and future public convenience and necessity for the period prior to Sept. 28, 1960 to be 16.0¢ and for the period subsequent to Sept. 28, 1960 to be 17.0¢ per Mcf."

The techniques and methodology of in-pricing has therefore been properly raised by Superior in its Application for Rehearing and Petition for Review and is a proper matter for review and resolution by this Court. The issue of price line technique and determination includes not only the improper exclusion of 20-cent non-suspect Trunkline sales and other permanent final certificates resulting from contested and non-

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[10] III R. 7441 *ibid.*

[11] III R. 7442 *ibid.*

[12] III R. 7444 ibid.

contested proceedings and settlement orders but also the improper inclusion of 14-cent sales held not to be proper in other price line determinations in District No. 3. The general issue of necessary ingredients to be considered in a price line determination has been properly raised.

Respectfully submitted,

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